84-1731

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE LORAIN JOURNAL CO.,
THE NEWS-HERALD,
and
J. THEODORE DIADIUN,
Petitioners,

v.

MICHAEL MILKOVICH, SR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF THE FACTS

A. The Facts

1. This libel action arises from the publication of certain false and defamatory statements about the Respondent, Michael Milkovich, Sr., in the News Herald, a newspaper in Northeastern, Ohio. The libelous article, a copy of which is attached as an Appendix to this brief in opposition at A-1, was published on January 8, 1975 in the News Herald and was written by petitioner J. Theodore Diadiun. The News Herald is owned by petitioner The Lorain Journal Co.

2. The article purported to describe the outcome of a judicial hearing conducted by the Franklin County Court of Common Pleas (Columbus, Ohio) on a suit brought by Respondent and others seeking to overturn a decision of the Ohio High School Athletic Association (OHSAA) forbidding the Maple Heights wrestling team from participating in post-season tournament play. *Barrett, et al. v. Ohio High School Athletic Assn.*, Case No. 74-CIV-09-3390 (C.P. Fran. Co., 1974), *aff'd*, Case No. 74-AD-24 (Fran. Co. 1975). The OHSAA had suspended the Maple Heights, Ohio team, of which Respondent was the coach, for allegedly violating certain requirements of the Association in an altercation that arose at an interscholastic meet between the Maple Heights team and the Mentor, Ohio team on February 8, 1974. Respondent and others had challenged the suspension on due process grounds. An evidentiary hearing was conducted on November 8, 1974 by the court but the decision was delayed until January 7, 1975. On that day, Judge Paul Martin of the Court of Common Pleas of Franklin County, Ohio issued a preliminary injunction enjoining the Association from enforcing its suspension.

3. On the following day, January 8, 1975, Theodore Diadiun wrote and the News Herald published the article in question. Entitled "Maple Beat the Law With the 'Big Lie,'"the Petitioner alleged that there was a lesson to be learned in the court's decision:

> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Petitioners went on to contend that Respondent and others had "declined to walk into [a hearing held by OHSAA] and face up to their responsibilities [in creating the altercation on February 8, 1974] as one would hope a coach of Milkovich's accomplishments and reputation would do . . . Indeed, they chose to come to the [OHSAA] hearing and misrepresent the things that happened. . ."

Petitioners went on to say that

> Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.
>
> Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and

> both Milkovich and his son, Mike Jr. (the Maple Jaycees [*sic*] coach), on two-year probation.
>
> But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.
>
> "I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."
>
> Nevertheless, the judge bought their story, and ruled in their favor.
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth. But they got away with it.

4. Petitioner Diadiun wrote the article described above without even being present at the evidentiary hearing held on November 8, 1974 (R. 1068). No other reporter from the News Herald was present at this hearing either (R. 1069). Petitioners never bothered to acquire a transcript of the testimony until well after the offending article was written and the instant case was pending. (R. 1079-1080).

5. Petitioner Diadiun contends that he relied exclusively on conversations with Dr. Harold Meyer concerning the events which transpired at the evidentiary hearing (R. 1068-1080). However, Dr. Meyer denies having spoken with Mr. Diadiun prior to the decision being

announced on January 7, 1975. (R. 1099). He further denies having told Mr. Diadiun anything attributed to him in the offending article (R. 1099-1109). He specifically denies that Respondent's testimony wa in-consistent between the OHSAA administrative hearing and the subsequent judicial hearing. (R. 1106; 1132-1136). In short, Dr. Meyer expressly and specifically refutes Mr. Diadiun's story in every way.

6. Mr. Milkovich did nothing other than participate in the hearing held by OHSAA to investigate what occurred at the wrestling match on February 8, 1974 and to participate in *Barrett, et al. v. Ohio High School Athletic Assn.*, Case No. 74-CIV-09-3390 (C.P. Fran. Co., 1974) with regard to influencing the outcome of the issues involving the wrestling match. He was a successful, well-respected wrestling coach prior to the allegations that he lied under oath to get himself out of a jam. He has never achieved general fame or notoriety.

B. The Proceedings

1. On April 30, 1975, Michael Milkovich filed a complaint containing a jury demand against the News Herald and The Lorain Journal Co., as owner and publisher of The News Herald in the Court of Common Pleas of Lake County, Ohio. The complaint was subsequently amended to add J. Theodore Diadiun as a defendant.

2. Petitioners filed a motion for summary judgment and, on May 23, 1977, the trial court granted the motion in part and held that Respondent was a "public figure."

3. The action proceeded to trial by jury. After five days of trial and at the close of Respondent's evidence, the court granted Petitioners' motion for a directed verdict and dismissed the action.

4. Respondent appealed the trial court's directed verdict to the Ohio Court of Appeals, Eleventh Judicial District (Lake County, Ohio). In an opinion dated December 3, 1979, the Court of Appeals reversed the trial court's directed verdict and remanded the case for further proceedings. *Milkovich v. Lorain Journal Co.*, 65 Ohio App.2d 143 (1979).

5. On December 27, 1979, Petitioners appealed to the Ohio Supreme Court. The Ohio Supreme Court dismissed Petitioners' appeal on March 20, 1980. Petitioners' motion for rehearing was similarly denied on April 25, 1980.

6. Petitioners then sought a writ of certiorari from this Court on July 23, 1980. This Court denied certiorari. *Lorain Journal Co. v. Milkovich*, 449 U.S. 966 (1980).

7. The action was returned to the Lake County Common Pleas Court for further proceedings. On April 17, 1981, Petitioners filed a second motion for summary judgment with the trial court alleging for the first time that the assertions of fact complained of by Milkovich were just "expressions of opinion." The trial court erroneously granted Petitioners' second motion for summary judgment and dismissed the action.

8. On October 26, 1981, Milkovich appealed the trial court's decision to the Ohio Court of Appeals, Eleventh Judicial District. Milkovich challenged the determination that he was a public figure and contended that the assertion that he had lied under oath was in no way constitutionally privileged. In an opinion

dated October 3, 1983, the Court of Appeals affirmed Milkovich's status as a public figure and upheld the trial court's issuance of summary judgment.

9. On November 30, 1983, Milkovich appealed the Lake County Court of Appeal's decision to the Ohio Supreme Court. The Ohio Supreme Court granted Milkovich's motion to certify the record. In a decision dated December 31, 1984, the Ohio Supreme Court reversed, holding that Milkovich was neither a public figure nor a public official, and determined that the assertion that Milkovich had lied under oath was not privileged. The case was remanded to the trial court for trial consistent with the negligence standard adopted by the Ohio Supreme Court in *Embers Supper Club v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 32 (1984). *Milkovich v. News Herald.* 15 Ohio St. 3d 292 (1984).

10. Petitioners filed, on January 9, 1985, a motion for rehearing which was denied on February 6, 1985.

11. Petitioners filed a Petition for a Writ of Certiorari on May 6, 1985.

REASONS FOR DENYING PETITIONERS' WRIT

I. THE OHIO SUPREME COURT PROPERLY DETERMINED THAT MICHAEL MILKOVICH WAS A PRIVATE PERSON FOR PURPOSES OF THE LAW OF DEFAMATION AND THAT HE THEREFORE NEED NOT SHOW ACTUAL MALICE TO RECOVER COMPENSATORY DAMAGES FOR INJURY TO HIS REPUTATION.

The Ohio Supreme Court correctly determined that Respondent was a private figure. A private figure in Ohio, consistent with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974), need not show actual malice to recover compensatory damages for injury to reputation. *Embers Supper Club v. Scripps-Howard Broadcasting Co.*, 9 Ohio St. 3d 22 (1984). Rather, a private figure under Ohio law need only show simple negligence. *Ibid.*

Respondent's private figure status results from the undisputed fact that he did not enjoy general fame or notoriety nor did he voluntarily inject himself into, or allow himself to be drawn into, a particular public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974). Respondent's sole involvement in the controversy that gave rise to this case was his truthful testimony in a court of law about events and circumstances that led to his probation and to the suspension of his high school wrestling team from post-season competition. As a result of this testimony, he was accused by Petitioners of having committed perjury. If these accusations are false, (which the evidence at trial would show beyond cavil) and if these accusations were at least negligently made, Respondent, under the precedents of this Court, and in strict accordance with the First Amendment to the United States Constitution, should

be permitted to recover those compensatory damages he can prove.[1] This is exactly what the Ohio Supreme Court held and there is no reason whatsoever for this Court to review that holding.

A. Respondent's Status As A Private Figure Is Fully Consonant With The Decisions Of This Court.

Petitioners are patently wrong in arguing that Respondent's status is controlled by *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). *Butts* was the first case in which the actual malice standard announced in *New York Times v. Sullivan*, 376 U.S. 254 (1964) was applied to persons other than public officials. Mr. Butts was the athletic director of the University of Georgia. Curtis Publishing Company published an article in *Look* magazine alleging that Mr. Butts had given Georgia's football plays, defensive patterns, and other significant secrets about the Georgia football team to the coach of the University of Alabama one week before a game between those teams. 388 U.S. 130, 136 (1966). Butts denied these allegations and sued for compensatory and punitive damages. He won a jury verdict for both compensatory and punitive damages. *Id.* at 138. This Court, 5-4, reversed.

Justice Harlan's opinion for the majority focused on whether the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964) should be applied in such a case. The actual malice standard was held to apply to "public figures" like Butts who "commanded a substantial amount of independent public interest at

[1]Respondent also seeks punitive damages and agrees that he must show actual malice in order to do so. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); cf. *Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ___ U.S. ___, ___ S.Ct. ___, 53 U.S.L.W. 4866 (Case No. 83-18, June 26, 1985).

the time of the publication[]" and who ". . . had sufficient access to the means of counterargument to be able to 'expose through discussion the falsehoods and fallacies' of the defamatory statements." 388 U.S. at 154.

The decision is unfortunately less than clear as to exactly how Mr. Butts "had commanded sufficient public interest," what the public's interest was, and how he could or did gain "access to the means of counterargument. . ." that he was held to have. Thus, it is not clear that *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) altered *Butts* in any way other than to more cogently analyze the question of public figure status in a different factual context.

Gertz made it plain that simple accomplishment did not make a person a public figure. Instead, only

> . . . an individual [who] achieve[s] such pervasive fame or notoriety . . . becomes a public figure for all purposes and contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. 323, 352 (1974). This Court further explained that

> [a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a meaningful context by looking to *the*

> *nature and extent of an individual's participation in the particular controversy giving rise to the defamation.* (emphasis supplied).

418 U.S. 323, 352 (1974).

Petitioners avoid the fact that the record *sub judice* is devoid of evidence that Respondent did anything other than testify truthfully in a judicial proceeding. Respondent did not thrust himself into the forefront of any issue and, as a high school wrestling coach, cannot tenably be claimed to have special prominence in the affairs of society at large. He had no general or special access to the "means of counterargument" and was truly "dragged unwillingly into [a] controversy" in much the same manner as was the plaintiff in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 166 (1979).

Petitioners focus on the superficial similarities in the fact patterns of *Butts* and the matter at bar (*i.e.* both were coaches). The record discloses that Respondent was merely a successful high school wrestling coach. Nowhere does the record reflect that Respondent, by dint of his position or otherwise, had anywhere near the position of power and influence as did Mr. Butts in Georgia. Moreover, this Court has made clear that, but for pervasive fame and notoriety, public figure status is achieved only by voluntarily injecting oneself into or otherwise being drawn into a particular public controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974). The benchmark in either case is whether a person "has assume[d] special prominence in the resolution of public questions." *Ibid.* Respondent unquestionably had never assumed "special prominence" in the resolution of any public question much less a dispute about a high school wrestling match in 1974.

It is, therefore, utter nonsense to argue, as Petitioners do, that "Ohio trial and appellate courts are precluded from relying on *Butts* to ascertain public figure status" by virtue of the Ohio Supreme Court's decision in *Milkovich*. (Petition at 13). Plainly Ohio trial and appellate courts are bound to follow all of this Court's pronouncements including those cases which have reexamined and refined *Butts*. It is, simply put, a red herring to argue that Ohio's judiciary is in limbo because the Ohio Supreme Court has interpreted *Gertz* in the same manner as have a plethora of other courts and in a manner fully consistent with this Court's latest pronouncements.

B. The Ohio Supreme Court Properly Applied This Court's Precedents In Concluding That Respondent Was A Private Figure.

Contrary to Petitioners' suggestion, the Ohio Supreme Court did not hold that *Gertz v. Robert Welch, Inc.*, 318 U.S. 323 (1974) "overruled" *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967). Rather, the Ohio Court declined Petitioners' invitation to woodenly apply the result in *Butts* to the case at bar where there were significant factual differences in the cases and significant refinements in the law made by this Court. In particular, the Ohio Supreme Court applied the standards from *Gertz* as amplified by the later cases of *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) and *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157 (1979) as follows:

> [W]e find that [holding Milkovich to be a public figure] . . . would require us to ignore the redefinition of the public figure status as enunciated in *Gertz* and its progeny. In applying the *Gertz* standard to the case *sub judice*, we hold

> that Milkovich is not a public figure as that term is utilized in First Amendment analysis. While appellant may be an individual recognized and admired in his community for his coaching achievements, he does not occupy a position of persuasive power and influence by virtue of those achievements. By the same token, appellant's position in his community does not put him at the forefront of public controversies where he would attempt to exert influence over the resolution of those controversies. While appellant did become involved in a controversy surrounding the events during and subsequent to his team's wrestling match with Mentor High School, appellant never thrust himself to the forefront of that controversy in order to influence its decision. Furthermore, it cannot be said that appellant assumed the risks of public life through the advertisement of his wrestling clinics. If this were the case, then any widespread advertisement for purely business purposes could result in the classification of an individual as a public figure. Given the application of the public figure definition since *Gertz*, we find appellant's status to be akin to the status of the plaintiff in *Firestone*, *supra*, rather than the status of the athletic director in *Butts*, *supra*. *Milkovich*, 15 Ohio St. 3d at 296.

Petitioners' unhappiness with this analysis reveals fundamental misunderstanding of the plain meaning of *Gertz*. Petitioners urge that because Respondent had been successful as a high school wrestling coach, he, *a fortiori*, had become a public figure, presumably for all purposes (Petition at 14-15). This position is directly

contradicted by *Gertz*. Moreover, this Court noted in *Gertz* that it ". . . would not lightly assume that a citizen's participation in community and professional affairs renders him a public figure for all purposes." 418 U.S. 323, 352 (1974). But this is exactly what Petitioners urge.

Petitioners also suggest that Respondent "affirmatively thrust himself into both the creation and resolution of the matter" that gave rise to the defamatory article being published. (Petition at 15). Of course, they know this is false and the Ohio Supreme Court expressly found that Respondent did no such thing. 15 Ohio St. 3d at 296.

The record shows that Respondent merely testified truthfully about the events that led to the suspension of himself and his wrestling team by the Ohio High School Athletic Association. This cannot, as a matter of law, be sufficient to amount to voluntarily injecting oneself into a particular public controversy giving rise to public figure status.

C. The Ohio Supreme Court Properly Determined that Respondent Was Not A "Public Official" As That Term Has Been Defined In *New York Times Co. v. Sullivan* and Its Progeny.

Almost as an afterthought, Petitioners argue that Respondent should have been classed as a "public official" because he was employed by a public school system in Ohio as a high school wrestling coach. The Ohio Supreme Court rejected this contention out of hand and this Court's precedents made it clear that it was unequivocally correct in doing so.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court held that certain "public officials"

could not recover damages for publication of a defamatory falsehood relating to their official conduct absent proof of actual malice. *Id.* at 283. There the Plaintiff-Respondent was an elected commissioner of the City of Montgomery, Alabama whose duties included police supervision. The New York Times Company published an advertisement that incorrectly described certain police actions in Montgomery. The Court determined that this publication was critical of Mr. Sullivan in his official capacity and thus the actual malice standard should apply. *Ibid.*

However, this Court specifically reserved a determination of "how far down into the lower ranks of governmental employees the 'public official' designation would extend for purposes of this rule." 376 U.S. at 283, N.23 (1964). In *Rosenblatt v. Baer,* 383 U.S. 75 (1966), the Court reached the question again. Noting that "[n]o precise lines need be drawn for the purposes of this case," *Id.* at 85, the Court focused on the rationale of the actual malice standard which was, in part, to promote the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues." *Ibid.* Thus, the Court held that "'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." 383 U.S. at 85. The Court went on to explain that

> [w]here a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all governmental employees, . . . the *New York Times* malice standards apply.

Id. at 86. In a footnote, the Court explained further that the "employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." 383 U.S. at 86-87, N. 13.

Petitioners do not suggest how a mere high school wrestling coach occupies such a prominent position that his qualifications and performance are of special interest to the public other than to argue that Respondent had a "rather significant responsibility for and control over educating young people, impressionable athletes. . ." (Petition at 16). If a high school wrestling coach who interacts with "impressionable athletes" is a public official, then it should follow that any first grade teacher, school bus driver, or other similarly situated public employee would likewise be a "public official." This, of course, would eviscerate the right of a very significant percentage of Americans to protection of their reputations which "would virtually disregard society's interest in protecting reputation." *Rosenblatt v. Baer,* 383 U.S 75, 87, N.13 (1966).

While Petitioners seem unable to recognize it, this Court has long recognized that defamation actions involving the press require an "accommodation of the competing values at stake." *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 348 (1974). Thus, there is a "legitimate state interest underlying the law of libel [which is] compensation of individuals for the harm inflicted on them by defamatory falsehoods" *Id.* at 341. The "individual's right to protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any de-

cent system of ordered liberty" *Id.* at 341, *citing Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (J. Stewart, concurring). As Chief Justice Berger recently observed, "the great rights guaranteed by the First Amendment carry with them certain responsibilities as well." *Dunn & Bradstreet Inc. v. Greenmoss Builders, Inc.,* ___ U.S. ___, ___ S.Ct. ___, 53 U.S.L.W. 4866, 4870 (Case No. 83-18, June 26, 1985) (concurring). These precious interests would be ill served if every public employee from a janitor on up could be construed to be a "public official" for purposes of the law of defamation.

II. THE DEFAMATORY FALSEHOODS PUBLISHED BY PETITIONERS WERE NOT MERE EXPRESSIONS OF OPINION.

The Ohio Supreme Court properly characterized the defamatory falsehoods published about Respondent as assertions of fact and not as absolutely protected "heartfelt" opinion. A brief passage in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) gave rise in this case (and has been relied on in nearly every other recent defamation case) to claims that defamatory falsehoods are merely expressions of opinion entitled to absolute constitutional protection. The passage in *Gertz,* which is clearly *dicta,* reads as follows:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

418 U.S. at 339-340. Justice Rehnquist has only very recently noted that

> lower courts have seized upon the word "opinion" in the second sentence [of the above quote from *Gertz*] to solve with a meat axe a very subtle and difficult question, totally oblivious "of the rich and complex history of the struggle of the common law to deal with this problem." Hill, *Defamation & Privacy Under the First Amendment,* 76 Colum.L.Rev. 1205, 1239 (1976).

Ollman v. Evans, ___ U.S.___, ___ S.Ct. ___, 53 U.S.L.W. 3837 (Case No. 84-1624, May 28, 1985).

Petitioners in the case at bar urge adoption of the "meat axe" approach, *i.e.* ignore the plain import of the article in question and shield nearly any utterance, no matter how pernicious and false, from a suit for libel purportedly because of the First Amendment. The Ohio Supreme Court, appreciating fully the requirements of the First Amendment and the concomitant need to accommodate "a legitimate state interest underlying the law of libel [which is] compensation of individuals for the harm inflicted . . . by defamatory falsehoods," *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 341 (1974), had no difficulty whatsoever reaching the conclusion that the assertions about Respondent were not entitled to constitutional protection:[2]

> We find that the statements in issue are factual assertions as a matter of law and are not constitutionally protected as the opinions of the writer. Nothing in the article effectively precautions the reader that the author's statements are merely his considered opinion. The plain import of the author's assertions is that

[2]However, the Ohio Supreme Court wisely refused to adopt a *"per se* rule in determining what constitutes a protected opinion or a potentially redressable assertion of fact." 15 Ohio St. 3d 293, 298 (1984).

Milkovich, *inter alia*, committed the crime of perjury in a court of law.

Milkovich, 15 Ohio St. 3d at 298-299.

A. No matter How the Objectionable Statements Are Analyzed, the Inescapable Conclusion Is That They Are False Assertions of Fact and Not Constitutionally Protected Expressions of Opinion.

In many cases, unlike the one at bar, the distinction as to whether a particular statement is "opinion" entitled to constitutional protection or is an actionable assertion of fact is difficult to make. A number of analytical approaches have been developed. However, no matter how the following statements are analyzed, the inescapable conclusion reached is that Petitioners accused Mr. Milkovich of lying under oath:

> . . . Many are the lessons taken away from school by students which weren't learned from a lesson plan or a book . . . Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8. A lesson which, sadly, in view of the events of the past year, is well they learned early. It is simply this: *If you get in a jam, lie your way out. If you're successful enough, you stand an excellent chance of making the lie stand up, regardless of what really happened. The teachers responsible were mainly head Maple Heights wrestling coach Mike Milkovich* . . .
>
> • • •
>
> *Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich* . . .

> *lied at the hearing after* . . . *having given his solemn oath to tell the truth. But [he] got away with it.* Is that the kind of lesson we want our young people learning from their high school . . . coaches? I think not. (emphasis supplied).

One approach to making the opinion-fact distinction has been to analyze the particular statement in terms of how an ordinary and reasonable person would view it:

> [A]lthough difficult to state in abstract terms, as a practical matter, the crucial difference between statement and fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact . . . An expression of opinion occurs when the maker of the comment states the facts on which his opinion of the plaintiff is based and then expresses a comment as to the plaintiff's conduct, qualifications, or character . . . Criticism is privileged as fair comment only when the facts on which it is based are truly stated. . .

Mashburn v. Collin, 355 So.2d 879, 885 (La. 1977); *Economy Carpet Manufacturers and Distributors v. Better Business Bureau*, 361 So.2d 234 (La. 1978), *cert. denied*, 440 U.S. 915 (1975). This is an approach that has long been used to analyze the applicability of the common law privilege of fair comment. Comment, *Development in the Law of Defamation*, 69 Harv. L. Rev. 875, 927 (1956); Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 Vand. L. Rev. 1203 (1982). An ordinary person reading the above quoted article about Mr.

Milkovich could reach no other conclusion than that he lied under oath to get himself "out of a jam." If this assertion is false, a fact easily demonstrated, Petitioners must answer for the corresponding damage to Respondent's well-deserved reputation.

Another approach has been to determine if the language used has a definite meaning in the context in which it is used. In *Buckley v. Littell,* 539 F.2d 882 (2d Cir. 1976), two statements were analyzed using this approach. The court concluded that a description of Mr. Buckley as a "fellow fascist traveler" was nonactionable because the phrase could be variously interpreted and "because of the tremendous imprecision of the meaning and usage of those terms in the realm of political debate." *Id.* at 893. On the other hand, the Court found that an assertion that Mr. Buckley lied about others and libeled them was "constitutionally and . . . tortiously defamatory" since "there is no constitutional value in false statements of fact." *Id.* at 896, *citing Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974).

In the case at bar, precisely as in *Buckley,* the assertions complained are "constitutionally and tortiously defamatory" since they are assertions having definite, indeed unequivocal, meanings.

Other courts have evaluated particular statements to see if the assertions are empirically provable. The Second Circuit used this approach in *Buckley v. Littell,* 539 F.2d 882 (2d Cir. 1976) in conjunction with the textual analysis described above. It concluded that words and phrases such as "fellow traveler," "fascism," and "radical right" are "concepts whose content is so debatable, loose, and varying that they are unsusceptible to proof of truth or falsity." *Id.* at 893; *See, also,*

Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom., Hotchner v. Doubleday & Co.,* 434 U.S. 834 (1977). In the case at bar, however, the truth or falsity of whether Respondent lied to get himself "out of a jam" is readily provable since the hearing at which he purportedly did this was of record.

The context in which an objectionable statement appears has also been considered in a number of instances. In *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781 (9th Cir. 1980), the court adopted a three part inquiry: (1) Were any cautionary terms used? (2) How do the objectionable statements fit in context? and (3) What are the circumstances surrounding the publication? *Id.* at 783-784. By ". . . examin[ing] the statement in its totality in the context in which it was issued or published . . ." the true meaning of the article could be assessed. *Ibid.* In the case at bar, no cautionary statements were made, the context is not disputable, and the circumstances in which the statements were made do not suggest that the assertions that Mr. Milkovich lied after "having given his solemn oath to tell the truth" were merely opinions.

One of the most lucid and best reasoned judicial opinions concerning the distinction between fact and opinion, is *Cianci v. New Times Publishing Co.,* 639 F.2d 34 (2d. Cir. 1980). Judge Friendly carefully reviewed various approaches to the question in the context of an article alleging that the mayor of Providence, Rhode Island was a rapist and had obstructed justice. He concluded that

> [a] jury could find that the effect of the article was not simply to convey the idea that Cianci was a bad man unworthy of the confidence of the voters of Providence, but rather to produce a specific image of depraved conduct—

> committing rape with the aid of trickery, drugs, and threats of death or serious injury, and the scuttling of a well rounded criminal charge by buying off a victim. . . To call such charges merely an expression of "opinion" would be to indulge in Humpty-Dumpty's use of language. We see not the slightest indication that the Supreme Court or this Court ever intended anything of the sort and much to demonstrate the contrary. *Id.* at 64.

A comprehensive analysis of the opinion-fact distinction was recently undertaken by the United States Court of Appeals for the District of Columbia Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 53 U.S.L.W. 3837 (Case No. 84-1524, May 28, 1985).[3] There the court adopted a four part inquiry:

> (1) analyze the common usage or meaning of the specific language of the challenged statement itself; (2) consider the statement's verifiability; (3) consider the full context of the article itself; and (4) consider the broader context or setting in which the article occurs.

Id. at 979. As set out above, the challenged statements herein do not lend themselves under any method of analysis to the conclusion that they are protected opinion. Thus, there is no reason to review the Ohio Supreme Court's eminently sensible decision.

The majority opinion in *Ollman* contains a useful discussion which helps point up the wisdom of the Ohio Supreme Court's decision. The majority observed that

[3]The court, sitting *en banc*, issued seven opinions which together comprise 69 pages in volume 750 of *Federal Reporter 2d*.

> [w]hile courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one. Clearly, . . . paradigm examples of statements of fact [exist] . . . [which include] assertions that describe present or past conditions capable of being known through sense impressions . . . At the other extreme are evaluative statements reflecting the author's political, moral, or aesthetic views, not the author's sense perceptions.

Id. at 978. The case at bar presents one of the "paradigm examples of statements of fact." Petitioners expressly alleged that Respondent lied under oath. This assertion is readily verifiable by comparing his testimony at both hearings. This case, therefore, is not even a close call on the opinion-fact distinction. Since the objectionable statements are plainly assertions of fact, the Ohio Supreme Court was right in holding that Petitioners could not tenably assert a constitutionally-based privilege in the case at bar.

B. The Decision of the Ohio Supreme Court Is Fully Consonant With the Decision of the United States Court of Appeals for the Sixth Circuit in *Orr v. Argus-Press Company*, 586 F.2d 1108 (6th Cir. 1978).

Petitioners' transparent attempt to create a conflict between the decision in the case at bar and a prior decision of the Sixth Circuit should be rejected as frivolous. A number of courts have recognized that even obvious expressions of opinion can be actionable if the existence of undisclosed facts is implied which are the basis for the opinion. One such case is *Orr v. Argus-Press Co.*, 586

F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979), which recognized and applied the Restatement (Second) of Torts, Section 566. A *sine qua non* of this analysis, however, is that the statement(s) complained of be an expression of opinion and *not* an assertion of fact. Thus, as the court in *Ollman v. Evans,* 750 F.2d 970, 984 (D.C. App. 1984) said,

> [a]fter deciding that a particular statement is opinion rather than fact, courts often undertake a second mode of analysis before wrapping the statement in the mantle of the First Amendment's opinion privilege. Relying upon the Restatement (Second) of Torts Sec. 566, the courts consider whether the opinion implies the existence of undisclosed facts as the basis for opinion. If the opinion implied factual assertions, courts have held that it should not receive the benefit of First Amendment protection as an opinion.

The result in *Orr v. Argus-Press Co., supra,* is consistent with the method of analysis described above and is furthermore definitely not in conflict with the result in the case *sub judice.* The Sixth Circuit in *Orr* determined that the statements complained of were clearly opinion and that the opinions stated were not actionable because the underlying facts were fully disclosed. *Id.* at 1115.[4] In the case at bar, the statements complained of are paradigm examples of factual assertions. Thus, the

[4]Orr, an attorney and a builder, conceded the truth of facts in a story about his being charged with 34 counts of fraud in connection with solicitations for investments in a shopping mall. He nevertheless complained of a newspaper's characterization of the charges as "alleged swindle" and of his conduct as "a phony shopping mall scheme."

question of whether the underlying facts were sufficiently disclosed was not, and need not have been, reached.

Accordingly, there is no conflict between the result or the rationale in *Orr* and the result and reasoning in *Milkovich.* The claimed "conflict" perceived by Petitioners in these decisions is wholly illusory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Ohio Supreme Court should be denied.

Respectfully submitted,

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Maple beat the law with the 'big lie'

By TED DIADIUN
News-Herald Sports Writer

Yesterday in the Franklin County Common Pleas Court, judge Paul Martin overturned an Ohio High School Athletic Assn. decision to suspend the Maple Heights wrestling team from this year's state tournament.

It's not final yet — the judge granted Maple only a temporary injunction against the ruling — but unless the judge acts much more quickly than he did in this decision (he has been deliberating since a Nov. 8 hearing) the temporary injunction will allow Maple to compete in the tournament and make any further discussion meaningless.

But there is something much more important involved here than whether Maple was denied due process by the OHSAA, the basis of the temporary injunction.

TD Says

When a person takes on a job in a school, whether it be as a teacher, coach, administrator or even maintenance worker, it is well to remember that his primary job is that of educator.

There is scarcely a person concerned with school who doesn't leave his mark in some way on the young people who pass his way — many are the lessons taken away from school by students which weren't learned from a lesson plan or out of a book. They come from personal experiences with and observations of their superiors and peers, from watching actions and reactions.

Such a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8.

Please turn to page 39

Milkovich takes aim at Columbus

COLUMBUS, Ohio (AP) — Maple Heights wrestling Coach Mike Milkovich says his team will be shooting for an unprecedented 11th state wrestling title following a judge's ruling yesterday allowing the team to compete.

Judge Paul Martin granted the high school a temporary injunction. The injunction stops the Ohio High School Athletic Association from enforcing a suspension against the team.

"We're all happy at Maple Heights," the coach said. "I don't know whether we'll win or not, but I know the kids have something to shoot for."

The OHSAA had suspended the team from the 1975 tournament after a hearing over a melee in a 1974 dual meet.

The Franklin County Common Pleas Court judge ruled that the association had not followed due process in the hearing.

"Accordingly," he ruled, "the suspension from the StateHigh School Wrestling Tournament of the Maple Heights team is unconstitutional and hereby enjoined."

Carlisle Dollings, attorney for the association, said he could not comment on the decision until he had examined it and talked to the association. He declined to discuss the possibility of an appeal.

Commissioner Harold Meyer of the governor body of state scholastic sports was attending a National High School Federation winter meeting in Orlando, Fla., and could not be reached.

Maple Heights won an unprecedented 10th big school state wrestling championship last March after the Mustangs and visiting Mentor were involved in a regular season brawl.

Four Mentor wrestlers were hospitalized after the disturbance during a dual match at Maple Heights.

Following the incident, the OHSAA conducted a hearing before its state board of control and suspended the team from the 1975 tournament.

... Diadiun says Maple told a lie

(Continued from Page 35)

A lesson which, sadly, in view of the events of the past year, is well they learned early.

It is simply this: If you get in a jam, lie your way out.

If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.

The teachers responsible were mainly head Maple wrestling coach Mike Milkovich and former superintendent of schools H. Donald Scott.

Last winter they were faced with a difficult situation. Milkovich's ranting from the side of the mat and egging the crowd on against the meet official and the opposing team backfired during a meet with Greater Cleveland Conference rival Metor, and resulted in first the Maple Heights team, then many of the partisan crowd attacking the Mentor squad in a brawl which sent four Mentor wrestlers to the hospital.

Naturally, when Mentor protested to the governing body of high school sports, the OHSAA, the two men were called on the carpet to account for the incident.

But they declined to walk into the hearing and face up to their responsibilities, as one would hope a coach of Milkovich's accomplishments and reputation would do, and one would certainly expect from a man with the responsible poisition of superintendant of schools.

Instead they chose to come to the hearing and misrepresent the things that happened to the OHSAA Board of Control, attempting not only to convince the board of their own innocence, but, incredibly, shift the blame of the affair to Mentor.

I was among the 2,000-plus witnesses of the meet at which the trouble broke out, and I also attended the hearing before the OHSAA, so I was in a unique position of being the only non-involved party to observe both the meet itself and the Milkovich-Scott version presented to the board.

Any resemblance between the two occurances is purely coincidental.

To anyone who was at the meet, it need only be said that the Maple coach's wild gestures during the events leading up to the brawl were passed off by the two as "shrugs," and that Milkovich claimed he was "Powerless to control the crowd" before the melee.

Fortunately, it seemed at the time, the Milkovich-Scott version of the incident presented to the board of control had enough contradictions and obvious untruths so that the six board members were able to see through it.

Probably as much in distasteful reaction to the chicanery of the two officials as in displeasure over the actual incident, the board then voted to suspend Maple from this year's tournament and to put Maple Heights, and both Milkovich and his son, Mike Jr. (the Maple Jaycee coach), on two-year probation.

But unfortunately, by the time the hearing before Judge Martin rolled around, Milkovich and Scott apparently had their version of the incident polished and reconstructed, and the judge apparently believed them.

"I can say that some of the stories told to the judge sounded pretty darned unfamiliar," said Dr. Harold Meyer, commissioner of the OHSAA, who attended the hearing. "It certainly sounded different from what they told us."

Nevertheless, the judge bought their story, and ruled in their favor.

Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.

But they got away with it.

Is that the kind of lesson we want our young people learning from their high school administrators and coaches?

I think not.